

Appointment of Arbitrator by a person ineligible under Section 12(5) of the Arbitration and Conciliation Act, 1996 is void ab initio

written by Rajeev Rambhatla | May 11, 2019

The Hon'ble Supreme Court of India in its recent judgement in the case of *Bharat Broadband Networks Limited ("BBNL") v. United Telecoms Limited ("UTL")*[1], held that the appointment of arbitrator by a person who is himself as an Arbitrator ineligible under Section 12(5) of the Arbitration and Conciliation Act, 1996 ("the Act") is void ab initio. The bench consisting of Justice R F Nariman and Justice Vineet Saran has pronounced a similar judgement in the case of *TRF Limited v. Energy Engineering Projects Limited*[2] wherein it was held that an ineligible person cannot appoint an arbitrator.

Factual Background:

The disputes in the matter at hand

arose out of an agreement between BBNL and UTL, wherein the contractual disputes were referred to arbitration. The agreement provided that the Chairman

and Managing Director of BBNL or any person appointed by him shall be the arbitrator to whom disputes arising from the contract should be referred. UTL invoked the arbitration clause on 03/01/2017 and in response the Chairman and Managing Director of BBNL appointed Mr. K H Khan as an arbitrator.

Thereafter,

on 03/07/2019 the judgement in the case of *TRF Limited*[3]

was pronounced. In light of judicial developments, BBNL sought withdrawal of Mr. K H Khan as arbitrator, however Mr. K H Khan rejected the request for withdrawal. BBNL challenged the rejection under the provisions of Section 14[4]

and Section 15[5] of

the Act before the High Court of Delhi. The Hon'ble High Court was pleased to dismiss

BBNL's application while holding that BBNL was estopped from questioning the mandate of the arbitrator appointed by itself. Further, the High Court observed

that it is evident from the conduct of the parties that they have accepted the

mandate of the arbitrator as BBNL itself had appointed the arbitrator and UTL filed waiver of objections under the proviso of Section 12 Clause (5) of the Act. BBNL approached the Hon'ble Supreme Court of India, challenging the judgment of the High Court of Delhi.

Ruling/Ratio - Arbitrator ineligible under Section 12(5):

The Hon'ble Justices heard contentions

of both parties and after due consideration was given to averments of both sides, the bench allowed BBNL's appeal while holding that the ineligibility under Section 12 (5) of the Act is *de*

jure in nature which leads to an automatic termination of the arbitrator's mandate.

Analysis - Arbitrator ineligible under Section 12(5):

Justice Nariman authored the judgement

and allowing the instant appeal he observed:

"where such person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such

arbitrator. In such a case, i.e., a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e., de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated"

Wherefore, if a person is by law ineligible to be appointed as an arbitrator then appointment of such a person as arbitrator is void ab initio, consequently, appointment of another person by

a person so ineligible under Section 12 (5) of the Act is also void ab initio as the mandate of the ineligible person itself stands terminated. In cases of ineligibility in accordance with Section 12 (5) of the Act there is no procedure for challenge of the ineligibility, however if a person continues to

operate as an arbitrator despite being ineligible for appointment, the court may

decide on termination of his mandate upon an application being made by one of the parties.

Further, appointment of another person

by a person ineligible under Section 12 (5) of the Act is void. In the instant

case, the bench took notice of the fact that the Chairman and Managing Director

of BBNL was himself an ineligible person as per the seventh schedule to the Act

which barred managers, directors and other employees of a company which is a party to the arbitration from being an arbitrator. The bench applied its decision in the case of TRF Limited^[6]

and held that the Chairman and Managing Director of BBNL could not appoint another arbitrator as he was himself ineligible for appointment as Arbitrator.

UTL argued that as per Section 12 (4) of the Act a party who appointed the arbitrator can only challenge his mandate for reasons which they became aware of after the appointment was made. UTL insisted that BBNL was well aware of the

ineligibility before the appointment, the Hon'ble Supreme Court rejected this

contention while observing that the ineligibility arose only after the TRF Judgement was pronounced which was after the appointment of the arbitrator by BBNL. The Bench also clarified that Section 12 (4) of the Act has no applicability to an application made under Section 14 (2) of the

Act to determine whether the mandate of an arbitrator has terminated owing to his ineligibility stemming from Section 12 (5) of the Act.

The Hon'ble Bench further observed:

"Whether

such ineligible person could himself appoint another arbitrator was only made clear by this Court's judgment in TRF Ltd. (supra) on 03.07.2017, this Court holding that an appointment made by an ineligible person is itself void ab initio. Thus, it was only on 03.07.2017, that it became clear beyond doubt that

the appointment of Shri Khan would be void ab initio. Since such appointment goes to "eligibility", i.e., to the root of the matter, it is obvious that Shri Khan's appointment would be void. There is no doubt in this case that

disputes arose only after the introduction of Section 12(5) into the statute book, and Shri Khan was appointed long after 23.10.2015. The judgment in TRF Ltd. (supra) nowhere states that it will apply only prospectively, i.e., the appointments that have been made of persons such as Shri Khan would be valid appointments even if they were made before the date of the judgment in the case

of TRF Ltd. (supra)".

The Hon'ble Bench then considered the question of waiver of objections to ineligibility of an arbitrator under Section 12 (5) of

the Act as it did not agree with the High Court's interpretation of waiver. The

Bench noted that as per Section 12 (5) of the Act the waiver of objections to ineligibility of an arbitrator should be express and in writing. The Bench further noted that BBNL objected to the continuation of Mr. K H Khan after the

judgement in TRF Limited[7]

however it concluded that the fact that UTL filed its claim statement before the arbitrator cannot be considered or presumed as waiver of objections

to the appointment/continuation of the arbitrator. Consequently, the Hon'ble Bench set aside the Delhi High Court's judgement and allowed BBNL's appeal.

Conclusion: Since the decision in TRF Limited[8] was pronounced it was clear that a person ineligible to be appointed as an arbitrator cannot appoint an arbitrator however there were several questions as the retrospective application of the said judgment and the impact on appointments made before the pronouncement of the judgement which were clarified by the Hon'ble Supreme Court in this successful appeal. The instant judgement will be instrumental in questioning the technicality of the appointment of a certain arbitrator and is thus a boon for many litigants having disputes resolved by arbitration.

Contributed by - Rajeev Rambhatla

[1] CIVIL

APPEAL NO. 3972 OF 2019 (Arising out of Special Leave Petition (Civil)

No.1550

of 2018)

[2]

(2017) 8 SCC 377

[3]

Ibid

[4] Failure

or impossibility to act.

[5] Termination

of mandate and substitution of arbitrator.

[6]

Ibid

[7] Ibid

[8] Ibid

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